discharge claim based upon qualified immunity. Pet. App. 12. The Court of Appeals affirmed the District Court's denial of summary judgment based upon qualified immunity on the hostile work environment claim. Pet. App. 11. The Court of Appeals held that verbal sexual harassment alone, without any physical touching or sexual propositioning, rose to the level of a constitutional violation sufficient to support a claim under 42 U.S.C. § 1983. Pet. App. 10. In reaching this decision, the Court of Appeals found that § 1983 claims are analyzed under the same standard as Title VII, not to a higher standard, and "the elements of the prima facie case are the same regardless of which statute the plaintiff uses to seek relief." Pet. App. 6.

REASONS FOR GRANTING THE WRIT

I. The decision of the court below creates a conflict among the circuits, and is contrary to prior Supreme Court precedent, by holding that Title VII standards are to be used in determinations of liability under 42 U.S.C. § 1983.

In holding that it has been clearly established that there is a constitutional right to be free of verbal sexual harassment, the Eighth Circuit's decision stands alone among other circuit courts. The Eighth Circuit concluded erroneously that Title VII standards are to be applied to the determination of § 1983 claims.

While verbal sexual harassment alone, if sufficiently severe and pervasive, does constitute a valid cause of action under Title VII, the respondent did not assert a

claim under Title VII against the petitioner nor could she. *See Dici v. Pennsylvania*, 91 F.3d 542, 552 (3d Cir. 1996); *Lissau v. Southern Food Service, Inc.*, 159 F.3d 177, 180 (4th Cir. 1998); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1111 (8th Cir. 1998); *Spencer v. Ripley County State Bank*, 123 F.3d 690 (8th Cir. 1997); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (no individual liability under Title VII).

The Eighth Circuit's decision, if left standing, creates individual liability for violations of Title VII where Congress clearly did not intend such liability. The United States Supreme Court has held that Title VII standards are not to be applied for purposes of resolving constitutional claims under the Civil Rights Act of 1964. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) (standards applicable to Title VII cases should not have been applied in resolving the constitutional due process issues raised in an employment case involving alleged racial discrimination).

As stated by the Tenth Circuit Court of Appeals in *Drake v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir. 1991) a plaintiff must have an independent basis for claims under § 1983 outside of Title VII for fear that the remedies prescribed by Congress under Title VII may be undermined. *See also Day v. Wayne County Board of Auditors, et al.*, 749 F.2d 1199, 1203 (6th Cir. 1984); *Notari v. Denver Water Dept.*, 971 F.2d 585, 588 (10th Cir. 1992) (claiming that reliance upon Title VII provisions for substantive validity are foreclosed under § 1983); *Gierlinger v. New York State Police*, 15 F.3d 32, 34 (2nd Cir. 1994) (§ 1983 claim of sexual harassment must be based on a distinct violation of a constitutional right and not upon Title VII). The Eighth Circuit suggested that the respondent's

constitutional rights were violated under the Equal Protection Clause, but as a matter of law no constitutional violations are supported by respondent's allegations of verbal sexual harassment alone. *See* Argument II, *infra*.

The issue of whether there is a constitutional right to be free from verbal sexual harassment has not been clearly established. *See, e.g.*, *Blueford v. Frunty*, 108 F.3d 251, 255 (9th Cir. 1997) (finding qualified immunity for verbal "same-sex" sexual harassment claim); *Schwenk v. Hartford*, 204 F.3d 1187, 1198 (9th Cir. 2000) (determining no qualified immunity where verbal harassment combined with forcible sexual contact). While verbal sexual harassment alone may be sufficient to establish liability pursuant to Title VII, it is not enough to establish a constitutional violation so as to support a claim under 42 U.S.C. § 1983. Petitioner's research has not uncovered a single case allowing a § 1983 claim based solely upon verbal sexual harassment to go to trial.

II. The decision of the court below creates a conflict among the circuits in holding that sexual harassment claims under 42 U.S.C. § 1983 can be based solely upon verbal harassment, where no physical touching or sexual propositioning is involved.

The Eighth Circuit's decision creates a conflict with previous decisions of the Eighth Circuit, Tenth Circuit, and First Circuit in the context of 42 U.S.C. § 1983, as opposed to Title VII claims. These courts have consistently held, in a variety of circumstances, that verbal harassment alone does not state a claim under the Fifth Amendment, Eighth Amendment, or Fourteenth Amendment to

the United States Constitution. *See, e.g., Doe v. Gooden*, 214 F.3d 952, 955 (8th Cir. 2000) (stating that teachers use of patently offensive language, demeaning and belittling students is not a constitutional violation under 42 U.S.C. § 1983); *Howard v. Everett, et al.*, 208 F.3d 218 (8th Cir. 2000) (unpublished disposition) (holding that prison officials were entitled to qualified immunity where conduct consisted of sexual comments and gestures, but no contact or touching); *Abeyta v. Chama Valley Independent School District, et al.*, 77 F.3d 1253, 1256 (10th Cir. 1996) (finding teacher who repeatedly called student a "prostitute" entitled to qualified immunity; gender-specific verbal harassment does not state claim for constitutional violation even though it might state a Title VII claim in employment context); *King v. Olmsted County, et al.*, 117 F.3d 1065, 1067 (8th Cir. 1997) (stating "Generally, mere verbal threats made by a state-actor do not constitute a § 1983 claim. . . . Fear or emotional injury which results solely from verbal harassment or idle threats is generally not sufficient to constitute an invasion of an identified liberty interest."); and *Pittsley, et al. v. Warish, et al.*, 927 F.2d 3, 7 (1st Cir. 1991) (verbal harassment was not invasion of plaintiffs' liberty interests).

Even the Eighth Circuit, in a prior 14th Amendment § 1983 sexual harassment decision arising in an employment case, distinguished between claims of verbal harassment and physical harassment by reversing in part and affirming in part the district court's denial of summary judgment to a sheriff based upon qualified immunity. *See Hawkins v. Holloway*, 316 F.3d 777 (8th Cir. 2003). The court in *Hawkins* held that with the exception of physical conduct toward a female deputy, the sheriff's actions, which included verbal harassment, did not rise to the level

of a violation of the plaintiff's constitutional rights. *Id* at 789.

This Court should clarify that verbal sexual harassment alone does not rise to the level of a constitutional violation. The Eighth Circuit's opinion did not cite to any case, nor has our research uncovered any case, where 42 U.S.C. § 1983 liability was imposed based solely upon evidence of verbal sexual harassment alone. All of the decisions the Eighth Circuit relied upon in this case fall into one of the following categories: § 1983 gender or race discrimination claims with no allegations of sexual harassment;[2] § 1983 sexual harassment where there has been not only verbal sexual harassment, but physical sexual harassment or the seeking of sexual favors;[3] or Title VII cases with no allegations of liability pursuant to § 1983.[4]

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[2] *See, e.g., Hardin v. Stynchomb*, 691 F.2d 1364 (11th Cir. 1982) (gender discrimination – Title VII only); *Peterson v. Scott County*, 406 F.3d 515 (8th Cir. 2005) (gender discrimination).

[3] *See, e.g., Moring v. Arkansas Dept. of Corrections, et al.*, 243 F.3d 452 (8th Cir. 2001) (physical contact and sexual propositioning); *Cross v. State of Alabama, et al.*, 49 F.3d 1490 (11th Cir. 1995) (physical contact as well as propositioning); *Beardsley v. Webb, et al.*, 30 F.3d 524 (4th Cir. 1994) (sexual proposals/advances).

[4] *See, e.g., Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997) (Title VII only). *Erenberg v. Methodist Hospital*, 357 F.3d 787 (8th Cir. 2004) (Title VII and ADEA – no § 1983 claims); *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021 (8th Cir. 2004) (no § 1983 claims); *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151 (8th Cir. 1999) (no § 1983 claims); *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040 (8th Cir. 2005) (no § 1983 claims); *Hathoway v. Runyon*, 132 F.3d 1214 (8th Cir. 1997) (no § 1983 claims); *Bailey v. Runyon*, 167 F.3d 466 (8th Cir. 1999) (no § 1983 claims); *Burns v. McGregor Elec. Indus. Inc.*, 989 F.2d 959 (8th Cir. 1993) (no § 1983 claims).

This Court's guidance is urgently warranted as decisions of the Eighth Circuit and other Circuits have casually relied upon, without any real discussion or analysis, Title VII standards to judge § 1983 claims of sexual harassment. However, unlike the lower court's decision in this case, none of those cases hold that verbal sexual harassment alone is sufficient to state a claim under 42 U.S.C. § 1983 in the face of a qualified immunity defense. For example, in *Tuggle v. Mangan*, 348 F.3d 714 (8th Cir. 2003), the Court used Title VII standards to reverse the district court's denial of the defendant's qualified immunity defense to the plaintiff's § 1983 sexual harassment claim, finding that the complained of conduct did not rise to the level of a constitutional violation.

While verbal sexual harassment alone is sufficient to state a claim under Title VII if it is severe and pervasive enough, and if the employee has taken reasonable steps to try and end the harassment, such as in the case of *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) (a decision interpreting Title VII only, with no § 1983 claims), the courts that have specifically addressed the issue have all held that verbal sexual harassment alone, without any physical harassment or propositioning, is not sufficient to rise to the level of a constitutional violation so as to support individual liability pursuant to 42 U.S.C. § 1983. *See* cases cited *supra* p. 15-16. Indeed, our research has not uncovered any case allowing a 42 U.S.C. § 1983 claim to go forward to trial based solely upon verbal sexual harassment, without any physical touching or sexual advances.

That is not to say that an employee who is subjected to verbal sexual harassment has no remedy. The remedy is a claim against the employer under Title VII. However,

Congress made it clear that there is no individual liability under Title VII; and 42 U.S.C. § 1983 should not be used to circumvent the intent of Congress. Therefore, certiorari is warranted to resolve the conflict created by the Eighth Circuit's decision in this case.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2766

Brigitte Wright, Plaintiff-Appellee; v. Rolette County, Defendant; Tony E. Sims, Rolette County Sheriff, in his individual and official capacity, Defendant-Appellant; Eldon E. Moors; Joseph S. Baker; Kenneth F. Brien; Michael W. Laducer; Robert E. Leonard, Rollete [sic] County Commissioners, in their individual and official capacities, Defendants.	*	Appeal from the United States District Court for the District of North Dakota

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Submitted: February 17, 2005
Filed: August 8, 2005

Before BYE, HEANEY, and MELLOY, Circuit Judges.

MELLOY, Circuit Judge.

Brigitte Wright ("Wright") brought this action under section 1983 for sexual harassment, alleging hostile work environment and constructive discharge against Sheriff Tony E. Sims ("Sims"). Sims moved for summary judgment based on qualified immunity. The district court denied qualified immunity, and Sims now brings this interlocutory appeal. We affirm in part and reverse in part.

I. Facts

The facts, taken in the light most favorable to the plaintiff, are described below. Wright is a Canadian citizen with permanent resident status in the United States. From September 2000 to October 2002, she worked in the Rolette County Sheriff's Department as an office deputy. During that time, Sims was the Sheriff of Rolette County. He was an elected official and was Wright's supervisor.

Use of vulgar, sexist language at the Sheriff's Office was a daily occurrence. During her employment, men in the office called Wright a "big-breasted Canadian secretary," a "dizzy bitch," and "Canadian bacon." Wright was offended and embarrassed by this name calling. Sims admits to this name calling and admits he did it in front of others. On one occasion, Sims referred to Wright as "Canadian bacon" at a Peace Officer's Association meeting, and all in attendance heard the comment. Sims also repeatedly made comments about a "potty cam" when Wright returned from the restroom. These comments embarrassed Wright to the point that she began using the restroom intended for female inmates. In another incident, Sims told Wright he could use a "blow job" after hearing

her explain that some police training she had received allowed her to knock somebody out with one blow.

Sims made other comments to Wright about "rubbing [her] tits with toilet paper" and referred to her vagina as a "snapper." Sims also stroked his mustache while telling Wright he was "clearing off her seat." Sims admits to making this comment to other women in the office several times. Sims also made comments to Wright about lesbian activity. Without belaboring the point, Sims made numerous other unwelcome comments of a sexual nature that would be offensive to any reasonable person. Sims admits to making most of these comments. Wright claims she protested such activity, but her objections were ignored.

In December 2001, Wright passed Correctional Officer Basic training. Wright attended training at the police academy and learned that sexual harassment included unwanted comments that were sexual in nature. Wright did not report the offensive statements immediately after her training for fear of retaliation.

In January 2002, Wright discussed the situation with Rolette County Commissioner Eldon Moors, who told her there was nothing he could do about it. In March 2002, Wright reported the situation to Rolette County States Attorney Mary O'Donnell. Wright alleges that the county did nothing to remedy the situation.

On March 29, 2002, Dr. Mallory Leon examined Wright and diagnosed her with high blood pressure, anxiety, and depression. Her physician prescribed Celexa, for depression, Xanax for anxiety and panic attacks, and Lotensin for high blood pressure.

On April 1, 2002, Wright gave notice to Rolette County alleging that Sims' behavior created a hostile work environment. Rolette County hired Attorney Pat Morley to investigate the claim. Wright was placed on paid leave during the investigation. The investigation was completed on or about June 27, 2002. Morley concluded that the comments, though inappropriate, were not unwelcome. Wright's administrative leave was terminated, and Wright returned to work on July 29, 2002. On October 25, 2002, Wright quit her job, claiming constructive discharge.

II. Procedure

On or about April 24, 2002, Wright filed a verified charge of discrimination with the North Dakota Department of Labor and the United States Equal Employment Opportunity Commission. On November 19, 2002 the North Dakota Department of Labor notified Wright of the termination of further proceedings on her charge of employment discrimination and that she had the right to bring a lawsuit within 272 days of the closure. On February 18, 2003, Wright commenced this § 1983 action against Sims, claiming sexual harassment in the form of a hostile work environment and constructive discharge. Sims moved for summary judgment based on qualified immunity, and the district court denied the motion. Sims now brings this immediate appeal on the issue of qualified immunity.

III. Discussion

A. Appellate Jurisdiction

While a denial of summary judgment is not generally reviewable on immediate appeal, we may review a denial

of summary judgment based on qualified immunity on immediate appeal "to the extent that it turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). "Beyond this narrow issue, we may exercise jurisdiction only over issues that are inextricably intertwined, meaning issues that would necessarily be resolved when we resolve the question of qualified immunity." *Schilcher v. Univ. of Arkansas*, 387 F.3d 959, 962 (8th Cir. 2004) (internal quotations and citation omitted).

B. Standard of Review

We review "de novo the denial of a motion for summary judgment based on qualified immunity." *Vaughn v. Ruoff*, 253 F.3d 1124, 1127 (8th Cir. 2001). "At the summary judgment stage, we must view the facts in the light most favorable to . . . the nonmoving party below . . . and 'take as true those facts asserted by [the nonmoving party] that are properly supported in the record.'" *Wilson v. Lawrence County*, 260 F.3d 946, 951 (8th Cir. 2001) (quoting *Tlamka v. Serrell*, 244 F.3d 628, 632 (8th Cir. 2001)). "'[I]f there is a genuine dispute concerning predicate facts material to the qualified immunity issue, there can be no summary judgment.'" *Gregoire v. Class*, 236 F.3d 413, 417 (8th Cir. 2000) (quoting *Lambert v. City of Dumas*, 187 F.3d 931, 935 (8th Cir. 1999)).

C. Qualified Immunity

"Government officials who perform discretionary functions are entitled to qualified immunity unless their alleged conduct violated clearly established federal constitutional or statutory rights of which a reasonable person in their positions would have known." *Ottman v. City of*

Independence, Missouri, 341 F.3d 751, 756 (8th Cir. 2003). We analyze qualified immunity issue in two steps. First, we ask whether the facts as asserted by the plaintiff "show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the answer is no, we grant qualified immunity. If the answer is yes, we go on to determine "whether the right was clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

D. Hostile Work Environment

1. Was there a violation of a constitutional right?

"Sexual harassment by state actors violate[s] the Fourteenth Amendment and establishes a section 1983 action." *Tuggle v. Mangan*, 348 F.3d 714, 720 (8th Cir. 2003); *see also Ottman*, 341 F.3d at 756 ("We have held intentional gender discrimination in public employment by persons acting under color of state law violates the Equal Protection Clause of the Fourteenth Amendment and is actionable under section 1983.").

Sims argues that the plaintiff must meet a higher standard to prove sexual harassment under section 1983 than is required under Title VII. We find this to be an erroneous statement of law. Sexual harassment claims under section 1983 are analyzed under the same standards developed in Title VII litigation and the elements of a prima facie case are the same regardless of which statute the plaintiff uses to seek relief. *See Moring v. Ark. Dep't of Corr.*, 243 F.3d 452, 455 (8th Cir. 2001); *see also*

Genosky v. Minnesota, 244 F.3d 989, 993 (8th Cir. 2001) (analyzing Title VII and section 1983 gender discrimination claims without using a different standard); *Headley v. Bacon*, 828 F.2d 1272 (8th Cir. 1987) (holding cause of action under Title VII and section 1983 identical for purposes of res judicata); *Cross v. Alabama*, 49 F.3d 1490, 1508 (11th Cir. 1995) (elements of sex discrimination causes of action are the same under section 1983 and Title VII); *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994) ("Courts may apply the standards developed in Title VII litigation to similar litigation under § 1983."); *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 n.16 (11th Cir. 1982) (holding cause of action under Title VII and section 1983 the same); *but see Annis v. County of Westchester, New York*, 36 F.3d 251, 254 (2d Cir. 1994) ("While we do not subscribe to a categorical view that sexual harassment equals sex discrimination, we do agree that harassment that transcends coarse, hostile and boorish behavior can rise to the level of a constitutional tort.").

Sims further contends that his behavior cannot constitute sexual harassment because there is no allegation that he touched Wright or made sexual advances toward her. Our case law does not support this contention. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 964 (8th Cir. 1993) (sexual harassment "can obviously result from conduct other than sexual advances" and the employee need not be "touched offensively") (citation omitted); *see Smith v. St. Louis Univ.*, 109 F.3d 1261, 1267 (8th Cir. 1997) (summary judgment for employer reversed when plaintiff pled harasser made sexist comments on marriage, pregnancy, and plaintiff's appearance, and called her a "babe", but alleged no physical conduct nor sexual advances). Further, 29 C.F.R. § 1604.11 states,

"Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Thus, verbal harassment of a sexual nature which creates an offensive working environment fits the regulation's definition of sexual harassment.

To make out a prima facie case of sexual harassment under section 1983, Wright must prove:

> (1) that she was a member of a protected group,
>
> (2) the occurrence of unwelcome harassment,
>
> (3) a causal nexus between the harassment and her membership in the protected group,
>
> (4) that the harassment affected a term, condition, or privilege of employment, and
>
> (5) that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

Erenberg v. Methodist Hosp., 357 F.3d 787, 792 (8th Cir. 2004). To determine whether the harassment affected a term, condition, or privilege of employment, we consider "the frequency of the behavior, its severity, whether physical threats are involved, and whether the behavior interferes with plaintiff's performance on the job." *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1026 (8th Cir. 2004). "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Breeding v. Arthur J. Gallagher & Co.*, 164

F.3d 1151, 1158 (internal citations omitted). In order to affect the term, condition, or privilege of employment, the harassment must be sufficiently severe or pervasive to create an objectively hostile work environment, and in addition, must be subjectively perceived by the plaintiff as abusive. *Kratzer v. Rockwell Collins, Inc.*, 398 F.3d 1040, 1047 (8th Cir. 2005).

We find that the facts as alleged show the violation of Wright's constitutional rights under the Equal Protection Clause. Wright is a member of a protected group and alleges that Sims, her supervisor, harassed her in a highly sexualized way. He targeted Wright and made extremely vulgar, sexual comments about her, sometimes in front of her colleagues. Wright alleges that the harassment, which took place over a two-year period, offended and embarrassed her. "Neither 'simple teasing' and 'offhand comments,' nor 'sporadic use of abusive language, gender-related jokes, and occasional teasing' amount to discriminatory changes in the terms and conditions of employment or actionable harassment." *Peterson v. Scott County*, 2005 WL 1048103, at *9 (8th Cir. May 6, 2005). However, Sims' behavior was more serious than simple teasing, and it was not sporadic nor isolated. The effect of the harassment was so serious that Wright ultimately sought medical treatment for depression, high blood pressure, and anxiety caused by the harassment. Wright also alleges that she complained to Sims and to the county and that nothing was done to stop the behavior. These facts, if proven to be true, support a claim for sexual harassment.

2. Was the right clearly established?

"The right to be free of gender discrimination is clearly established." *Peterson*, 2005 WL 1048103 at *10. Sims does not dispute that the right to be free of sexual harassment was not clearly established at the time of his actions. Rather, he contends there can be no sexual harassment under section 1983 unless there is physical touching or a request for sexual favors, and therefore the right to be free of behavior such as his was not clearly established. As stated above, we believe this is an erroneous view of the law. Taking the facts in the light most favorable to Wright, Sims' behavior constituted gender discrimination. A reasonable officer would have known that it was illegal to subject Wright to such treatment in the workplace. Therefore, Sims is not entitled to qualified immunity or summary judgment on the hostile work environment claim.

E. Constructive Discharge

1. Was there a violation of a constitutional right?

Wright also claimed that the harassment caused her to be constructively discharged. "Constructive discharge occurs when an employer deliberately renders the employee's working conditions intolerable, thereby forcing her to quit." *Baker v. John Morrell & Co.*, 382 F.3d 816, 829 (8th Cir. 2004). To prove a case of constructive discharge, a plaintiff must show: (1) "that a reasonable person in her situation would find the working conditions intolerable" and (2) that "the employer . . . intended to force the employee to quit." *Gartman v. Gencorp Inc.*, 120 F.3d 127, 130 (8th Cir. 1997). If the plaintiff cannot show

the employer consciously intended her to quit, she can still prevail on a constructive discharge claim if "'the employer . . . could have reasonably foreseen that the employee would [quit] as a result of its actions.'" *Fenney v. Dakota, Minnesota & Eastern R.R. Co.*, 327 F.3d 707, 717 (8th Cir. 2003) (quoting *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017 (8th Cir. 1999)).

In this case, Wright has failed to meet this standard, and therefore Sims is entitled to qualified immunity on the constructive discharge claim. While Sims' behavior was serious and reprehensible, Wright has not shown that her work conditions would be intolerable to a reasonable person. In contrast, it appears that the harassment all but stopped after Wright's return to work following her leave period. Wright was back at work from July 2002 until she resigned in October 2002. Wright admitted that Sims' behavior during this period was improved. In fact, there were no incidents of harassing behavior during July, August, or September. Wright stated that the harassment began again in October, but even then, the environment was "not like it was before," referring to more serious harassment in the past. This evidence shows that the work environment was not so intolerable so as to force Wright to quit. Therefore, Wright has failed to show that the facts as alleged in regard to the constructive discharge claim show a violation of a constitutional right. Sims is entitled to qualified immunity and summary judgment on this claim.

IV. Conclusion

We find that Sims is entitled to qualified immunity on the constructive discharge claim, but not entitled to

qualified immunity on the hostile work environment claim. We remand to the district court for proceedings consistent with this opinion.

BYE, Circuit Judge, concurring.

I concur with the majority as to the facts as alleged by Ms. Wright, if proven true, could support a claim for sexual harassment, but not a claim for constructive discharge. I write separately in regards to section III.D.2 of the opinion, which discusses the clearly established prong of the qualified immunity inquiry. The majority declares "[t]he right to be free of gender discrimination is clearly established." This hasty resolution of the clearly established prong ignores the Supreme Court's pronouncements in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) and *Saucier v. Katz*, 533 U.S. 194, 201 (2001). It is now well-settled the clearly established analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Tuggle v. Mangan*, 348 F.3d 714, 720 (8th Cir. 2003) (quoting *Saucier*, 533 U.S. at 201). Although we do not require a precise factual analog to precedent, in light of pre-existing law the unlawfulness of specific conduct must be apparent to a reasonably competent official. *Anderson*, 483 U.S. at 640; *Saucier*, 533 U.S. at 202. The importance of this particularized inquiry cannot be discounted because it is the teeth of the qualified immunity defense. Without these teeth, the defense lacks the bite essential in promoting the compelling public policy objectives underlying it. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (discussing the societal costs associated with litigation against public officials).

In other words, because of the societal costs associated with litigation against public officials, *id.*, we hold our

officials individually liable only for transgressing bright constitutional lines. *Crow v. Montgomery*, 403 F.3d 598, 602 (8th Cir. 2005) (citing *Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004)). Interestingly, in the hostile work environment context we have stated, "[t]here is no bright line between sexual harassment and merely unpleasant conduct . . ." *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1026 (8th Cir. 2004) (quoting *Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997)). This statement, though telling of the difficulty we face in analyzing hostile work environment cases, must not be taken literally because our case law clearly establishes at least two lines bright enough for officials such as Sheriff Sims to take notice.

Our case law, for instance, suggests a person engaged in repetitive offensive touching in combination with pervasive sexual innuendo has clearly crossed the line. *Henthorn*, 359 F.3d at 1027 n.3 ("[W]e have found to be actionable conduct that involved pervasive sexual innuendo and repetitive offensive touching."); *Baker v. John Morrell & Co.*, 382 F.3d 816, 828 (8th Cir. 2004) (same); *Eich v. Bd. of Regents*, 350 F.3d 752, 755-56 (8th Cir. 2003) (en banc) (finding conduct sufficiently severe where the victim was frequently touched in numerous suggestive ways and subjected to simulated sex acts); *Beard v. Flying J., Inc.*, 266 F.3d 792, 797 (8th Cir. 2001) (affirming judgment for plaintiff where another employee frequently brushed, rubbed and flicked plaintiff's breasts and pointed to his crotch); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 616-17 (8th Cir. 2000) (upholding a jury verdict where plaintiff was subjected to physical touching, obscene hand gestures, and a verbal barrage of crude sexual vulgarities); *Bailey v. Runyon*, 167 F.3d 466, 469 (8th Cir. 1999) (upholding a jury verdict

where male co-worker grabbed plaintiff's crotch and requested opportunity to perform oral sex on plaintiff three or four times a week); *Howard v. Burns Bros. Inc.*, 149 F.3d 835, 840 (8th Cir. 1998) (upholding a jury verdict where the victim was subjected to chronic sexual innuendo and unwanted physical contact); *Hathaway*, 132 F.3d at 1217-18 (upholding a jury verdict where the plaintiff was subject to offensive physical contact and constant snickering and guttural noises from her co-workers); *Hall v. Gus Const. Co.*, 842 F.2d 1010, 1012-14 (8th Cir. 1988) (finding unwanted physical contact, repeated requests to engage in sexual acts and continuous verbal abuse sufficiently severe or pervasive as a matter of law). Thus, based upon our case law, it would be apparent to a reasonable official by engaging in repetitive offensive touching along with pervasive sexual innuendo does cross the boundary between merely offensive conduct and actionable sexual harassment.

Ms. Wright complains of no repetitive offensive touching, but, as the majority points out, the boundary is not drawn at repetitive offensive touching. A harasser may cross the line without frequently physically assaulting the victim. *See Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 964 (8th Cir. 1993) ("Sexual harassment can take place in many different ways."). The line between merely offensive conduct and sexual harassment may be crossed, even without physical contact, where a person engages in pervasive sexual innuendo. *See Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1159 (8th Cir. 1994) (finding a situation where an employee's supervisor continuously fondled his genitals in front of her and used lewd and sexually inappropriate language to be sufficient as a matter of law to constitute sexual harassment). Our

case law clearly establishes sexual innuendo or discriminatory conduct is pervasive or abusive when it is both frequent and severe. *See id.*; *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (listing the circumstances to be considered in determining whether an environment is hostile or abusive, including: the frequency and severity of the discriminatory conduct; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance).

That is not to say our case law is a model of clarity in the absence of frequent and severe discriminatory conduct. In fact, the line between merely offensive conduct and actionable sexual harassment is blurred where the harassment, though severe, occurs relatively infrequently,[1] or where the complained of conduct, though frequent, is relatively innocuous.[2] But the conduct at issue here is neither infrequent nor innocuous. Thus, if Ms. Wright's allegations turn out to be true, Sheriff Sims's conduct falls within the realm of frequent and severe sexual innuendo

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[1] *See LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d 1098, 1100-03 (8th Cir. 2005) (finding severe, but infrequent conduct insufficient as a matter of law to support a claim for hostile work environment); *Duncan v. GMC*, 300 F.3d 928, 931-34 (8th Cir. 2002) (en banc) (same).

[2] *Compare Ottman v. City of Independence*, 341 F.3d 751, 760 (8th Cir. 2003) (frequent, but relatively innocuous conduct not enough); *Henthorn*, 359 F.3d at 1028 (same); *Tuggle*, 348 F.3d at 714, 721-22 (same); *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 977-78, 980 (8th Cir. 2003) (same); *Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958, 961, 967 (8th Cir. 2003) (same); *with Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1106-09 (8th Cir. 1998) (frequent, relatively innocuous conduct sufficient); *Williams v. City of Kansas City*, 223 F.3d 749, 753 (8th Cir. 2000) (same); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264-65 (8th Cir. 1997) (same).

and outside the protection of the qualified immunity defense.

HEANEY, Circuit Judge, dissenting.

I would affirm the district court on both the hostile work environment and constructive discharge counts. Thus, I respectfully dissent from the majority's opinion insofar as it holds that Rolette County Sheriff Tony Sims is entitled to qualified immunity on Brigitte Wright's claim of constructive discharge.

A plaintiff claiming constructive discharge based on a hostile work environment must make two showings: first, she must show the presence of harassing behavior so pervasive or severe that it altered the plaintiff's working conditions. *Pa. State Police v. Suders*, 124 S.Ct. 2342, 2347 (2004). Second, she must demonstrate that "the abusive working environment became so intolerable that her resignation qualified as a fitting response." *Id.*; *see also id.* at 2351 ("The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?"). The district court found both prongs were met, and I agree.

Wright was constructively discharged from her position due to the extreme, harassment-based humiliation she was forced to endure. Sims directed an office in which sexually explicit and offensive conduct was the order of the day. Wright was the sole female employee of that office, and thus regularly found herself as the target of Sims' lewd behavior and comments. Sims apparently found his own behavior entirely acceptable; prior to Wright's first formal complaint on April 1, 2002, Sims was of the belief that sexual harassment included physical touching and

unwanted advances,[3] but not verbal abuse of a sexual nature. Sims had no formal training on sexual harassment, yet the County policy (which Sims had apparently ignored) clearly prohibited "[a]ction, words, jokes or comments based on an individual's sex," as well as "[v]erbal abuse of a sexual nature." (J.A. at 151.)

The context of Wright's workplace is relevant not only to her hostile work environment claim, but also to her claim of constructive discharge. The majority finds that the environment was not so pervasively hostile that Wright was forced to quit, because the harassment "all but stopped" once she returned from work following investigation of her complaint. *Ante* at 9. While Sims' behavior was slightly better for a time, this does not tell the entire story. Wright returned to work in late July of 2002 after the County concluded that there was no wrongdoing on the part of Sims. This forced Wright to return to an environment that this court has found to be hostile, with no prospect of improvement in Sims' behavior.

In the factually similar case of *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612 (8th Cir. 2000), our court rejected this same argument. In *Henderson*, the plaintiff was subjected to a hostile work environment stemming from coworkers' targeted sexual vulgarities and harassment. After the plaintiff complained to her supervisor, the offending coworkers discontinued their verbal harassment.

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[3] Even under Sims' own definition of harassment, some of Sims' comments would certainly meet his standard. They included: stating he could not pay attention while Wright was talking because he was staring at her breasts, vocalizing his desire for oral sex when Wright recounted a police training program she had completed, and suggesting that he would like to perform oral sex on Wright.

One coworker, however, directed offensive hand gestures at the plaintiff. When the plaintiff complained, her supervisor did nothing further. Eventually, the plaintiff resigned and successfully claimed she was constructively discharged. On appeal, the defendant argued that the verdict on constructive discharge could not stand because the plaintiff's conditions improved after her complaints. We disagreed:

> Simmons's half-hearted responses to Henderson's complaints, Simmons's threat against Henderson's job, Simmons's poorly conducted investigation, Simmons's failure to transfer either Henderson or Sanchez [the offending employee], and Simmons's failure to respond to Sanchez's lewd gestures toward Henderson certainly demonstrates the existence of an intolerable working environment where an employee essentially is left with no choice other than the termination of her employment.

Id. at 617.

There is nothing of note to distinguish this case from *Henderson*. When Wright reported Sims' misconduct to Rolette County State's Attorney Mary O'Donnell, O'Donnell met the complaint with skepticism and disbelief. When Wright complained to Rolette County Commissioner Eldon Moors about Sims, Moors told her he was sorry, but that "All [the County] can do is control his budget," and "that's the way it is." (Wright Dep. at 127.) Finally, when the County investigated the matter, it used an investigator whose deposition reveals he had no understanding of even basic sexual harassment law. When the investigator's report concluded that Sims engaged in no wrongdoing with respect to Wright, she was forced to return to the same

office, with the same supervisor, without even an acknowledgment that she indeed had been experiencing unlawful sexual harassment.

We would have a different case if the investigation had found that Sims' conduct toward Wright was objectionable, or if Sims or the County assured Wright that the environment would improve upon her return. That is not the case, however. As the majority notes, the atmosphere was better for Wright when she returned, but not for long. After a relatively short respite, Sims returned to his pre-complaint ways, making sexually explicit comments and using offensive terms in Wright's presence. As I read the majority opinion, it would require Wright to again complain when Sims engaged in inappropriate behavior upon her return, or to wait until Sims' conduct escalated to his past benchmarks for impropriety. I would not impose this demand. The investigation conducted at the behest of the County found no violation of the County's sexual harassment policy, and forced Wright to return to an environment that the district court and this court have found objectively hostile.[4] Even though an employee must generally give the employer an opportunity to correct the problem before resigning, *Campos v. City of Blue Springs, Mo.*, 289 F.3d 546, 550-51 (8th Cir. 2002), where "an employee quits because she reasonably believes there is no chance for fair treatment, there has been a constructive

[4] Inexplicably, the report also discounted Wright's complaints about Sims' conduct because "[t]here is no evidence other than that of Ms. Wright that there was ever any complaint made to Sheriff Sims about the teasing, language, or crude jokes." (J.A. at 159.) I am aware of no requirement in the law that a victim of sexual harassment must have their complaints witnessed or joined by others before they are considered legitimate.

discharge." *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1008 (8th Cir. 2000); *accord Delph v. Dr. Pepper Bottling Co.*, 130 F.3d 349, 356 & n.5 (8th Cir. 1997) (excusing a plaintiff's failure to complain to supervisors about his hostile work environment where they created and condoned the objectionable atmosphere). Whether Sims' conduct, and correspondingly, the atmosphere for Wright, had improved to the point that her constructive discharge claim fails is clearly a question of fact. Thus, I would affirm the district court's denial of summary judgment on this matter.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2766

Brigitte Wright, Plaintiff-Appellee; v. Rolette County, Defendant; Tony E. Sims, Rolette County Sheriff, in his individual and official capacity, Defendant-Appellant; Eldon E. Moors; Joseph S. Baker; Kenneth F. Brien; Michael W. Laducer; Robert E. Leonard, Rollete [sic] County Commissioners, in their individual and official capacities, Defendants.	*	Appeal from the United States District Court for the District of North Dakota.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is

affirmed in part and reversed in part in accordance with the opinion of this Court. (5172-010199)

August 8, 2005

Order Entered in Accordance with Opinion:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Brigitte Wright, Plaintiff, vs. Rollette [sic] County; Rolette County Sheriff Tony E. Sims, in his individual and official capacity; Rolette County Commissioners Eldon E. Moors, Joseph S. Baker, Kenneth F. Brien, Michael W. Laducer, and Robert E. Leonard, in their individual and official capacities, Defendants.	Case No. A4-03-23 **MEMORANDUM AND ORDER** (Filed Jun. 17, 2004)

Before the Court are two motions for summary judgment filed by the Defendants, one by Sheriff Sims and the other by Rolette County and the Rolette County Commissioners. The Plaintiff resists the motions. For the reasons explained below, the Court grants in part and denies in part the motions for summary judgment.

I. BACKGROUND[1]

The Plaintiff, Brigitte Wright, was born in Canada in 1968 and is a Canadian citizen. She moved to Rolla, North Dakota in early 2000. She married Chris Wright on May 20, 2000. Chris Wright is a Rolla Police Officer. The City of Rolla is located in Rolette County. Ms. Wright began her employment with the Rolette County Sheriff's Department in September of 2000. She was interviewed, hired and supervised directly by Sheriff Sims. She was hired as an office deputy and was the only woman in the Department. Her duties included looking after prisoners, transcribing tapes, assisting people coming in for complaints, answering the phone, dispatching, and processing civil paperwork. The Sheriff's Department has nine full-time law enforcement officers, including the Sheriff. The position of county sheriff is an elected one. N.D.C.C. § 11-10-02.

Ms. Wright received favorable performance appraisals throughout her employment. In December of 2001, Ms. Wright completed and passed Correctional Officer Basic training. It was while she was at the police academy that Ms. Wright came to understand that sexual harassment included unwanted comments of a sexual nature. Sheriff Sims did not understand this until it was explained to him by an attorney after Ms. Wright filed a formal complaint.

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[1] The Court notes the disparity in the factual background recited by the parties and concludes as it must that the factual background must be viewed in a light most favorable to the plaintiff. These factual disagreements point out the need for a trial where the jury can decide whether "things were truly as bad, offensive and troubling" as Ms. Wright alleges.

Ms. Wright did not report the offensive statements immediately after being trained at the police academy for fear of retaliation.

Ms. Wright's complaint centers on unwanted and unwelcome comments, vulgarities and jokes of a sexual nature that were directed at her by Sheriff Sims throughout her employment. Ms. Wright was regularly referred to as the "big-breasted Canadian secretary," "dizzy bitch," "big-breasted," "big-breasted Canadian bacon," "big-breasted Canadian bitch," and "Canadian bacon." On one occasion Sheriff Sims referred to Ms. Wright as Canadian bacon at a Peace Officer's Association meeting. The comment was heard by everyone in attendance. Repeated "potty cam" comments made by Sheriff Sims to Ms. Wright after she returned from the women's restroom embarrassed her to the point she began using the restroom reserved for female inmates. On another occasion Sheriff Sims told Ms. Wright he could use a "blow job" after hearing her explain that some police training she had received allowed her to knock somebody out with one blow. On yet another occasion Sheriff Sims asked Ms. Wright if she and her friends were "licking each other's pussies." Additional comments by Sheriff Sims toward Ms. Wright included references to her "rubbing her tits with toilet paper," "fur trading" as a synonym for lesbian sexual activity, referring to Ms. Wright's vagina as "snapper," and stroking his mustache while telling Ms. Wright he was "clearing off her seat." Vulgar language in general was quite common in the Sheriff's office. Sheriff Sims admits to having made most of these comments although he disputes the context.

Ms. Wright alleges these references amounted to a hostile work environment and constituted sexual harassment which culminated in her being constructively discharged on October 25, 2002. The Defendants assert that the various comments made by the Sheriff were good natured and that at the time they were made Ms. Wright did not find them offensive.

When Ms. Wright protested to Sheriff Sims regarding such statements she was ignored and the comments continued. Ms. Wright also complained to her husband about the Sheriff's comments but would not let him discuss it with the Sheriff for fear of being retaliated against. Signs were posted in the Sheriff's Department stating that behavior such as that exhibited by Sheriff Sims toward Ms. Wright was prohibited and would not be tolerated.

In January of 2002, Ms. Wright discussed the situation with Rolette County Commissioner Eldon Moors who told her there was not anything he could do about it. In March of 2002, Ms. Wright reported the situation to Rolette County States Attorney Mary O'Donnell. It is alleged that the County, although it had notice of the situation, did nothing to remedy or correct it.

On April 1, 2002, Ms. Wright gave written notice to Rolette County of the hostile work environment and that she considered herself constructively discharged. In response Rolette County hired an attorney to investigate the situation. The investigation was consistent with the County sexual harassment policy. Ms. Wright was placed on paid administrative leave. The report concluded the inappropriate comments were not unwelcome. The administrative leave was terminated and Ms. Wright returned to

work on July 29, 2002. On October 25, 2002, Ms. Wright quit her job claiming constructive discharge.

On or about April 24, 2002, Ms. Wright filed a verified charge of discrimination with the North Dakota Department of Labor and the United States Equal Employment Opportunity Commission. On November 19, 2002, the North Dakota Department of Labor notified Ms. Wright of the termination of further proceedings on her charge of employment discrimination and that she had the right to bring a lawsuit with 272 days from the date of closure. On February 18, 2002, Ms. Wright received notice of right to sue Rolette County from the Department of Justice. This action was commenced on February 21, 2003, claiming violation of Title VII, § 1983, the North Dakota Human Rights Act and alleging intentional infliction of emotional distress.

II. ANALYSIS

The standard for granting a motion for summary judgment is well-settled. A movant is entitled to summary judgment if he or she can "show that there is no genuine issue as to any material fact and that [he or she] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of showing the Court that, on the evidence before it, there is no genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). If the moving party meets its burden, the nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also Celotex Corp.,* 477 U.S. at 324. Those specific facts must generate evidence from which a jury could

reasonably find for the nonmoving party; the mere existence of a scintilla of evidence supporting the nonmoving party's position is not sufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The Court must construe all reasonable inferences in favor of the nonmoving party, and it may not properly grant summary judgment where the issue turns on the credibility of witnesses. *Celotex Corp.*, 477 U.S. at 322-323. Summary judgment is rarely appropriate in the context of an employment discrimination case. *Mems v. City of St. Paul*, 224 F.3d 735, 737 (8th Cir. 2000).

A. QUALIFIED IMMUNITY AND SECTION 1983

The doctrine of qualified immunity protects state actors from liability in their personal capacity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Belk v. City of Eldon*, 228 F.3d 872, 882 (8th Cir. 2000) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity protects public officials from suit based upon the good faith performance of the discretionary duties they are obligated by office to perform. *King v. Beavers*, 148 F.3d 1031, 1034 (8th Cir. 1998). Qualified immunity will not be afforded an official if he knew or reasonably should have known that his actions would violate the clearly established constitutional or statutory rights of the plaintiff. *Harlow*, 457 U.S. at 818. The denial or grant of qualified immunity is a matter of law for the court. *Arnott v. Mataya*, 995 F.2d 121 (8th Cir. 1993).

Qualified immunity analysis is a two step process. *Washington v. Normandy Fire Prot. Dist.*, 272 F.3d 522, 526 (8th Cir. 2001). The first step is to assess whether the

facts alleged, viewed in a light most favorable to the plaintiff, show the defendant violated a constitutional right. *Id.* The second step is to determine whether the right that was violated was clearly established. *Id.* A constitutional right is clearly established if the law gives an official fair warning that conduct such as that complained of would violate an individual's rights. *Ottman v. City of Independence, Missouri,* 341 F.3d 751, 756 (8th Cir. 2003). In other words, would it be clear to a reasonable official that his conduct was unlawful. *Id.*

1. Sheriff Sims

"Sexual harassment by state actors violates the Fourteenth Amendment and establishes a section 1983 action." *Tuggle v. Mangan,* 348 F.3d 714, 720 (8th Cir. 2003). A prima facie case of hostile work environment sexual harassment require proof that the plaintiff was a member of the protected class, was subjected to unwanted sexual harassment, the harassment was based on sex and the harassment affected a term, condition, or privilege of employment. *Id.* Factors to be considered in determining whether conduct is sufficiently abusive to be actionable under § 1983 include the frequency of the conduct, its severity, whether the conduct is physically threatening or humiliating or just an offensive utterance and whether the conduct unreasonably interferes with the employee's job performance. *Moring v. Ark. Dept. of Corr.,* 243 F.3d 452, 455 (8th Cir. 2001).

The Court recognizes the high threshold which must be overcome to maintain an actionable claim for violation of a constitutional right in this context. *See id.* The actions of Sheriff Sims go beyond simple gender related jokes not

directed at anyone in particular or occasional teasing. The vulgarities were directed solely at Ms. Wright causing great humiliation and the need for medical treatment to alleviate stress, high blood pressure, anxiety and other ailments. The harassment continued over a two year period and was highly sexual in nature. Furthermore, Sheriff Sims was Ms. Wright's supervisor and did not alter his behavior when she complained to him about it. The Court categorically rejects the argument by Sheriff Sims that his harassment of Ms. Wright "[was] not because of her status as a woman, but rather because of characteristics of her gender which are personal to her." Such a statement defies logic. Sheriff Sims' lack of education is no excuse for such behavior either. The facts as alleged do establish a § 1983 hostile working environment sexual harassment claim.

The Court notes some level of disagreement in the Eighth Circuit over how severe the harassment must be in order to state an actionable hostile work environment sexual harassment claim. *Compare Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 759-60 (8th Cir. 2004) (holding sufficient evidence supported jury's verdict where plaintiff was subjected to numerous touchings and sexual innuendos), *with Duncan v. General Motors Corp.*, 300 F.3d 928, 933 (8th Cir. 2002) (2-1 decision, Arnold, R.S., J., dissenting) (finding evidence insufficient to support jury verdict in favor of where plaintiff was subjected to one proposition, four or five touchings of the hand, teasing and a request to make a vulgar drawing). Both *Eich* and *Duncan* were Title VII cases reviewing the grant of judgment as a matter of law after trial. The Court concludes that even though the present case does not involve any touchings the verbal harassment exceeds that

in both *Eich* and *Duncan* and on a whole is on par with the harassment in *Eich* and constitutes an actionable constitutional violation.

The next question is whether the right was clearly established. The Eighth Circuit takes a broad view of what constitutes clearly established law for qualified immunity purposes. *Washington v. Normandy Fire Prot. Dist.*, 272 F.3d at 526. The alleged conduct of Sheriff Sims would clearly violate the Rolette County sexual harassment policy which prohibits graphic or suggestive comments about an individual's dress or clothing and also prohibits sexually degrading comments. That the law was clearly established is evidenced by the County having a policy prohibiting it. The Supreme Court has recognized sexual harassment in the form of a hostile working environment since 1986. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The Eighth Circuit has recognized that sexual harassment in the workplace may constitute a § 1983 claim since at least 1999. *Klein v. McGowan*, 198 F.3d 705, 710 (8th Cir. 1999). Tellingly, Sheriff Sims has not addressed the second prong of the test in his brief. The Court concludes the right was clearly established.

2. County Commissioners

Having engaged in none of the harassing conduct, the Commissioners cannot be said to have violated any of Ms. Wright's constitutional rights. The County Commissioners can hardly be faulted for the actions of Sheriff Sims. Assuming they were aware of his harassment of Ms. Wright, they were powerless to do anything about it. In North Dakota, Sheriffs and County Commissioners are elected officials. N.D.C.C. § 11-10-02. Accordingly, the

County Commissioners cannot fire or reprimand Sheriff Sims. The only control they have over the Sheriff's Office is setting and funding salaries. The County's control over the sheriff is quite limited and best described as advisory. *1998 N.D. A.G. Op. L-107* (August 24, 1998). Nor could the County Commissioners sanction the Sheriff in any fashion for wrong doing or poor performance. *Id.* When Ms. Wright did file a complaint, the County Commission undertook an investigation as per the County's sexual harassment policy. It would have been the responsibility of Sheriff Sims to train his employees regarding sexual harassment in the workplace, not the County Commissioners. As such, all of the claims against the County Commissioners in their official as well as personal capacities must fail. The County Commissioners are entitled to qualified immunity.

3. Entity Liability

Official capacity claims are really claims against the entity, in this case Rolette County. *Eagle v. Moran,* 88 F.3d 620, 629 n.5 (8th Cir. 1996). While *respondeat superior* liability does not exist under § 1983, the Rolette County Sheriff's Department is an entity which may be sued under § 1983. *Monell v. Dept. of Soc. Services,* 436 U.S. 658, 691 (1978). However, a governmental entity may only be sued under § 1983 where the injury was incurred through the implementation of a governmental policy or custom. *Id.* at 694. Governmental entities do not enjoy qualified immunity. *Eagle v. Morgan* [sic], 88 F.3d 620, 628 (8th Cir. 1990).

In this case there has been no showing that the conduct of Sheriff Sims was part of any official policy. The

County Commissioners followed county policy by undertaking an investigation of the situation after Ms. Wright filed a complaint. Thus, no actionable § 1983 claim against Rolette County or Sheriff Sims in his official capacity has been stated.

B. CONSTRUCTIVE DISCHARGE

The Defendants argue that Wright has failed to establish that she was constructively discharged. Constructive discharge occurs when an employer renders an employee's working conditions so intolerable that the employee is forced to quit. *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 354 (8th Cir. 1997). "The conduct complained of must have been 'severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – ' if the plaintiff is to succeed." *Id.* (quoting *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370 (1983)). "In addition, 'the victim [must] subjectively perceive the environment to be abusive,' or the conduct at issue cannot be said to have 'actually altered the conditions of the victim's employment.'" *Id.* An employer's actions that lead an employee to quit must have been deliberately taken with the intention of forcing the employee to quit. *Id.* That is not to say that a conscious intent must be present in every case as the intent element may be proven by showing that the employee's resignation was a foreseeable consequence of the hostile work environment. *Id.*

The complained of conduct in this case is exceedingly loathsome and boorish as the Court has already pointed

out. The situation improved little after Ms. Wright returned from her leave of absence. The conclusion from the investigation (that the County's sexual harassment policy had not been violated) bolsters the argument for constructive discharge as apparently Sheriff Sims could continue his behavior without violating the County's sexual harassment policy. That the County Commissioners took no action in admonishing Sheriff Sims and indeed had no authority to reprimand him in any meaningful way renders the County's sexual harassment policy an ineffective grievance mechanism. Sheriff Sims himself had no policy of his own and was unaware of what conduct constituted sexual harassment. Suffice it to say that the Court does not find it at all surprising that an employee who endured what Ms. Wright alleges would feel it necessary to leave her employment. Viewing the evidence in a light most favorable to Ms. Wright the Court concludes she has stated a viable claim of constructive discharge. At trial the county will have an opportunity to assert the *Ellerth/Faragher* affirmative defense. *Penn. State Police v. Suders,* No. 03-95, 2004-WL 1300153 at *6 (U.S. June 14, 2004) (holding employers may assert affirmative defense that employee did not avail herself of corrective opportunities in a Title VII hostile work environment sexual harassment constructive discharge case). As in *Suders,* genuine issues of material fact exist in this case which preclude summary judgment.

That being said, the County Commissioners had no power to fire Ms. Wright and had little control over her working environment and thus cannot be held responsible on a constructive discharge claim.

C. NORTH DAKOTA HUMAN RIGHTS ACT

Sheriff Sims has not addressed this claim in his motion and therefore the analysis will only apply to the County and County Commissioners. As explained above, the County Commissioners can hardly be held accountable under the North Dakota Human Rights act when they had no control over the Sheriff. The liability of the County remains a question for the jury as the suit against Sheriff Sims in his official capacity is a suit against the County. Official capacity claims are really claims against the entity, in this case the Rolette County Sheriff's Department. *Eagle v. Moran,* 88 F.3d 620, 629 n.5 (8th Cir. 1996). An employee of the Rolette County Sheriff's department is an employee of the County. *Scofield v. Wilcox,* 156 N.W. 918 (N.D. 1916). Trial will proceed on that basis.

D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort of intentional infliction of emotional distress requires proof of three elements: (1) extreme and outrageous conduct that is (2) intentional or reckless and that causes (3) severe emotional distress. *Muchow v. Lindblad,* 435 N.W.2d 918, 923 (N.D. 1989) (holding police detective's quickly concluding woman had committed suicide, telling family members the body was found nude when it was partially clothed and telling family members their questioning of his determination of suicide was only done to assuage their feelings of guilt did not support a claim for intentional infliction of emotional distress). The Defendants assert the conduct alleged in this case is not extreme and outrageous as that phrase has been interpreted in North Dakota. Extreme and outrageous conduct has been defined as conduct which "exceeds all possible bounds of

decency" and would cause a reasonable person to exclaim "outrageous." *Zuger v. North Dakota*, 673 N.W.2d 615, 621 (N.D. 2004). Liability does not extend to mere insults or indignities. *Muchow,* 435 N.W.2d at 924. Rather, the offensive conduct must exceed all possible bounds of decency so as to be utterly intolerable in a civilized. society. *Id.*

When, at the summary judgment stage, one party asserts a lack of extreme and outrageous conduct the trial court must make the determination as to whether the defendant's conduct could reasonably be regarded as such, *Swenson v. Northern Crop Ins. Inc.,* 498 N.W.2d 174, 182 (N.D. 1993) (holding supervisor's oppression of female employee based upon her gender supported claim for intentional infliction of emotional distress even though supervisor did not resort to name-calling or the use of expletives[2]). "Where reasonable [people] may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. *Id.* (quoting *Muchow* 435 N.W.2d at 924, (quoting Restatement (Second) of Torts § 46 cmt. H (1965))).

In this case the alleged harassment by Sheriff Sims was exceedingly foul [sic] and highly sexual in nature. The comments were frequent, spanned a considerable length of time and were directed specifically at Ms. Wright. In addition, Sheriff Sims was Ms. Wright's supervisor and the chief law enforcement officer in the County which gave

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[2] The Court notes the possible Constitutional infirmities of the holding in *Swenson. See Security Nat. Bank, Edgeley v. Wald,* 536 N, W.2d 924, 929 (N.D. 1995) (Sandstrom, J., concurring specially). The case is helpful and persuasive even if not binding.

him great authority over her and made complaining about his comments all the more difficult. *See Swenson,* 498 N.W.2d at 185. (noting the relationship of employer/ employee is an important factor to consider). Eventually, Ms. Wright was forced to seek medical treatment to deal with the anxiety and depression brought on by the working environment.

Viewing all this evidence in a light most favorable to Ms. Wright the Court concludes she has established a claim for intentional infliction of emotional distress. To conclude otherwise would be to say that reasonable persons could not differ as to whether the conduct complained of was extreme and outrageous and this the Court cannot do.

While the conduct of Sheriff Sims may have been extreme and outrageous, the County Commissioners engaged in no conduct which could be described as extreme and outrageous and thus cannot be held liable for intentional infliction of emotional distress.

E. WORKERS COMPENSATION

The Defendants argue that Wright's claim for intentional infliction of emotional distress is barred by the North Dakota Workers' Compensation Act because Ms. Wright was Sheriff Sims' employee. The workers compensation statues [sic] only apply when there has been a compensable injury. *Choukalos v. North Dakota Workers' Compensation Bureau,* 427 N.W.2d 344, 346 (N.D. 1988) (holding mental injury resulting from termination of employment was not a compensable injury). A mental injury arising from mental stimulus is not a compensable injury. N.D.C.C. § 65-01-02(10)(b)(10). The *Choukalos*

court explained "workers' compensation benefits are not available for mental injury resulting from termination of employment, an employee whose employment is terminated can pursue other remedies." *Choukalos,* 427 N.W.2d at 346. The Court finds *Choukalos* persuasive.

Wright asserts constructive discharge based upon a hostile working environment caused her emotional distress. Constructive discharge is the equivalent of a firing and is actionable under Title VII. *See Penn. State Police v. Suders,* No. 03-95, 2004 WL 1300153 (U.S. June 14, 2004). Since her claim for intentional infliction of emotional distress is non-compensable under the workers' compensation statutes there is no bar to her proceeding with this claim against Sheriff Sims.

III. CONCLUSION

Human decency demands that workers be protected from sexual harassment in the workplace. *See Eich,* 350 F.3d at 754, 761. Summary judgment is rarely appropriate in the context of an employment discrimination case for good reason, the reason being that eight heads are better than one in sorting out what the facts really are.

Accordingly, Defendant Sims' motion for summary judgment (Docket No. 40) is **DENIED** and the motion for summary judgment (Docket No. 42) filed by Rolette County and the Rolette County Commissioners is **GRANTED**. The motion for oral argument (Docket No. 55) is **DENIED**.

Trial will proceed. against Sheriff Sims in his official and individual capacity. Rolette County itself remains a party, and liable for any damages, as a claim against

Sheriff Sims in his official capacity is a claim against the County. Any liability on the part of the County must flow through the actions of Sheriff Sims rather than the actions of the County Commissioners.

IT IS SO ORDERED.

Dated this 17th day of June, 2004.

/s/ Patrick A. Conmy
Patrick A. Conmy,
Senior District Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-2766

Brigette Wright,	*	
	*	
Appellee,	*	Order Denying Petitions
	*	for Rehearing and for
vs.	*	Rehearing En Banc
	*	
Tony E. Sims, etc., et al.,	*	
	*	
Appellant.	*	

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

(5128-010199)

September 14, 2005

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit